72-1019

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. A-534

HELEN STEIN GAUDET, Administratrix of THE ESTATE OF AWTREY C. GAUDET, SR.,

Plaintiff-Appellee,

versus

SEA-LAND SERVICES, INC.,

Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

McCLENDON, GREENLAND & DENKMAN
William H. McClendon, Jr.
3301 North Causeway Boulevard
Metairie, Louisiana 70002
Telephone: 837-2144
Attorneys for Defendant

SUBJECT INDEX

CITATIONS - Page 1

CITATIONS - Page 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. A-534

HELEN STEIN GAUDET, Administratrix of THE ESTATE OF AWTREY C. GAUDET, SR.,

Plaintiff-Appellee,

versus

SEA-LAND SERVICES, INC.,

Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Sea-Land Services, Inc., defendants, pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on August 3, 1972, petition for rehearing denied on August 24, 1972.

OPINION BELOW

The minute entry of the United States District Court for the Eastern District of Louisiana dismissing the plaintiff's claim on the grounds of res judicata and for failure to state a claim upon which relief can be

granted is printed in Appendix A hereto and there is no opinion of that Court.

The opinion of the United States Court of Appeals for the Fifth Circuit which reversed and remanded the judgment of the United States District Court for the Eastern District of Louisiana is printed in Appendix B and is reported at 463 F. 2d 1331.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, Section 1254(1) United States Code.

QUESTIONS PRESENTED

(1) Does recovery during the lifetime of a decedent under General Maritime Law for injuries preclude the survivors of decedent from instituting further claims for pecuniary loss resulting from the death of decedent?

(2) Do the survivors have a separate cause of action for pecuniary loss for death under General Maritime Law when the deceased, before his death has reduced his claim for pecuniary loss to judgment?

(3) Has the traditional refusal to award damages for loss of love and affection, society companionship and loss of consortium under General Maritime Law, the Jones Act and the Death on the High Seas Act been changed by the Supreme Court in their decision in MORAGNE VS STATES MARINE LINES?

(4) Is the uniformity intended by MORAGNE VS STATES MARINE LINES in fact destroyed by allowing damages for non pecuniary losses whereas the Jones Act and the Death on the High Seas Act have not traditionally

allowed such recovery?

(5) Is not the defendant deprived of his property without due process of law when the survivors of an injured party are allowed to present a new claim for pecuniary loss despite the fact that during his lifetime the decedent reduced his claim for pecuniary loss to a final judgment from a court of competent jurisdiction?

(6) Since the award to decedent before his death included pecuniary loss and anticipated all losses resulting from the accident, are not his survivors then restricted to recovery for non pecuniary damages (i.e., loss of love and affection, society, companionship and loss of consortium) which damages have never been allowed under the Jones Act, Death on the High Seas Act or General Maritime Law?

JURISPRUDENCE INVOLVED

CASES:

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

On October 29, 1966 Awtrey C. Gaudet, Sr. was injured on board the S/S CLAIBORNE, a vessel in navigable waters within the territorial limits of the State of Louisiana. After injury, suit was instituted by Awtrey C. Gaudet, Sr. in the United States District Court, Eastern District of Louisiana, which culminated in a jury verdict for Mr. Gaudet, Sr. with an award of $175,000.00 to be reduced by 20% for contributory negligence.

Ten days after the jury award Mr. Gaudet, Sr. died and thereafter his widow,Helen Stein Gaudet, was substituted in this first case to defend post-trial motion and to answer the appeal.

In the appeal of the original suit Mrs. Gaudet did not amend her answer to the defendant's appeal or request additional payment for financial loss due to her husband's death, and in effect acknowledged that she had recovered for the financial loss incurred. On June 24, 1970 Mrs. Gaudet was paid the sum of $131,000.00 which represents payment for severe financial loss by any reasonable standard.

Subsequently, this second suit was filed in the United States District Court, Eastern District of Louisiana by the widow of the deceased, alleging financial loss resulting from her husband's death, which she alleged was a result of the original accident of October 1966.

The defendant, Sea-Land Services, Inc., moved to dismiss the widow's claim for financial loss on the grounds of res judicata and for failure to state a claim upon which relief can be granted.

On October 29, 1971 after oral argument and consideration of supporting memorandums, the United States District Court granted the defendant's motion to dismiss.

The United States Court of Appeals for the Fifth Circuit, on August 3, 1972, reversed and remanded the case to the District Court and indicated that the deceased's recovery for his personal injuries and financial loss prior to his death did not bar Mrs. Gaudet's wrongful death action to recover for her financial loss.

The Court of Appeals acknowledged, in footnote 1 of their opinion, the possibility of double recovery but did not go forward to distinguish pecuniary from non-pecuniary losses and the recoverability by Mrs. Gaudet of non-pecuniary losses.

On August 24, 1972 the United States Court of Appeals for the Fifth Circuit denied the defendant's Petition for Rehearing. No opinion was rendered in connection with the denial of a rehearing.

On November 20, 1972 the Supreme Court of the United States granted a sixty-day extension to defendant to file the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

The United States Court of Appeals for the Fifth Circuit has created a conflict between recovery under General Maritime Law, the Jones Act and Death On The High Seas Act by allowing recovery for loss of love and affection, society, companionship and loss of consortium under the General Maritime Law in death cases whereas it has never been allowed under cases arising under the Jones Act or the Death On The High Seas Act.

Only one cause of action arose at the time of Awtrey Gaudet's accident on October 29, 1966. Two rights of action arose at that time; first, the right of Gaudet to prosecute his claim for personal injuries and resulting financial loss and, second, the right of Gaudet's survivors to prosecute the claim in the event Gaudet failed to prosecute it during his lifetime. The law allows only one right of action to be exercised, and since it was exercised by Gaudet during his lifetime, then no right of action was inherited by his survivors to present Gaudet's claim for financial loss.

At the time of Mr. Gaudet's death, one cause of action and one right of action came into existence insofar as claiming that the death resulted from the accident of October 29, 1966. That was the right of Gaudet's survivors to claim non pecuniary loss including loss of love and affection, society, companionship and loss of consortium.

The Fifth Circuit, in reversing the ruling of the trial court has in effect allowed recovery for non pecuniary losses to the survivors which recovery is contrary to General

Maritime Law. See Simpson v. Knutsen, 444 F. 2d 523 (9th Cir. 1971); Green v. Ross, 338 F. Supp. 356 (S.D. Fla. 1972); Dennis v. Central Gulf Steamship Corp. 453 F. 2d 137, 140 (5th Cir. 1972); Smith v. Olsen and Ugelstad, 324 F. Supp. 578 (E. D. Mich. 1971); Mugin v. Calmar Steamship Corporation, 342 F. Supp. 479 (D. Md. 1972) and Mascuilli v. United States 343 F. Supp. 439 (E. D. Pa. 1972).

The recent Louisiana case of Strickland vs Nutt, 264 So. 2d. 317 (1st Cir. 1972) is consistent with this view in denying recovery for non financial loss under General Maritime Law.

II

The Fifth Circuit has created a conflict with the Third Circuit case of Roberts vs. Union Carbide 415 F. 2d. 474 (1969).

In the case of Roberts vs. Union Carbide 415 F. 2d. 474 (3d Cir. 1969), plaintiff obtained judgment for Two Hundred and Ten Thousand ($210,000.00) Dollars for personal injuries. Five years after the accident decedent died and his survivors brought suit against the same defendant alleging that the prior accident was the cause of death. In affirming the trial court's dismissal of the matter, the Third Circuit stated:

> "The plaintiff's cause of action is barred and extinguished by the decedent's having obtained recovery during his lifetime."

The Court observed that this view is consistent with that of nearly all states having similar statutes and also referred to the annotation in 39 ALR 579 (1925).

The Fifth Circuit also cited Mellon vs. Goodyear 277 U. S. 335, 48 S. Ct. (1928), Flynn vs. New York, N. H. & H. R. Co. 283 U.S. 53, 51 S. Ct. 357 (1931) and Walrod vs. Southern Pacific 447 F. 2d. 930 (9th Cir. 1971) with approval.

The Supreme Court in Moragne suggested that cases in other areas of law should be employed to resolve questions raised but not answered by Moragne (398 U. S. at 391 and 392), however the Fifth Circuit has refused to follow clearly established rules in similar fields of law. These cases held that a decedent's recovery of damages for injuries which resulted in his death is a bar to an action by his personal representative for wrongful death if the decedent in his lifetime made a valid settlement for the injuries which resulted in his death. The Fifth Circuit in the Gaudet case has reached a different conclusion and has found that the recovery during decedent's lifetime is not a bar to his survivor's coming back into court for additional damages. This conflict should be resolved by the United States Supreme Court so that harmony and uniformity will prevail among the Circuits and so that the rights of litigants will be more clearly defined.

III

The United States Court of Appeals for the Fifth Circuit has misunderstood the intent of the United States Supreme Court in the case of Moragne vs. States Marine Lines, 398 U. S. 375 (1970) and has in effect undermined the finality of recoveries by settlement or judgment for personal injuries and opened the door for survivors to come back into court years later after the death of the decedent requesting additional damages for financial loss.

Before the Moragne decision there was no remedy for Moragne's widow and the Supreme Court, seeing the injustice and failure of the General Maritime Law to provide a remedy, reversed the harsh rule of the Harrisburg 119 U.S. 199 and gave the widow a cause and right of action to recover for the financial loss resulting from her husband's death. In Gaudet, however, Gaudet himself had filed suit and taken his case to judgment before his death. The Fifth Circuit is treating the Gaudet case as if no judgment had in fact been obtained and as if Gaudet had not in fact taken any steps to preserve his rights during his lifetime. In the closing sentence of the opinion the Fifth Circuit states:

> "We hold that such an action (for wrongful death) is not one that can be sued out, sold out, compromised or lost by the deceased's actions or inaction before it ever comes into being."

The Court also states that Mr. Gaudet had a cause of action immediately before his death. The Court, it is submitted, is mistaken in this statement for the cause of action for his injuries had been reduced to a judgment which judgment had become a property right and which was inherited by the survivors following his death.

We submit that the case of Mellon vs. Goodyear, 277 U. S. 335 (1928) enunciates principals of law which are applicable here. In the Gaudet decision the Court quoted from the Mellon case at page 344:

> "By the overwhelming weight of judicial authority where a statute of the nature of Lloyd Campbell's Act in effect gives a right to recover damages for the benefit of dependents,

> the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury". (Emphasis added).

However, the Fifth Circuit failed to quote the next sentence from the decision, which continues the thought and makes a closer application to Gaudet:

> "A settlement by the wrongdoer with the injured person, in the absence of fraud or mistake, precludes any remedy by the personal representative based upon the same wrongful act". (Emphasis added).
> Mellon v. Goodyear, 277 U. S. at 344.

Therefore, there was no longer any remedy at the time of decedent's death or thereafter for this right had been extinguished.

See also the case of Flynn vs. New York, N. H. & H. R. Co., 283 U. S. 53, (1931) where decedent was injured in 1923, died in 1928, and his executor brought a wrongful death action in 1929. Mr. Justice Holmes, speaking for the Court said:

> "Obviously Flynn's right of action was barred, but it is argued that the right on behalf of the widow and children is distinct; that their cause of action could not arise until Flynn's death, and that therefore the two years did not begin to run until September 1, 1928. But the argument comes too late. It is established that the present right, although not strictly representative, is derivative and dependent upon the continuance of a right in the injured

> employee at the time of his death. On this ground an effective release by the employee makes it impossible for his administrator to recover. The running of the two years from the time when his cause of action accrued extinguishes it as effectively as a release, Engel v. Davenport, 271 U. S. 33, 38, 46 S. Ct. 410, 70 L. Ed. 813, and the same consequence follows * * *" (Emphasis added.) 283 U.S. at 56, 51 S. Ct. at 358.

The Honorable Judge Alvin B. Rubin's comments at the motion for new trial following the death of the decedent are most appropriate here, as they reflect the well established rule that after a final judgment, neither the plaintiff can come back for more nor can the defendant request a reduction due to facts occurring subsequent to the judgment.

> "Now I know and am about to say with respect to damages that we judge all things as of the date of the trial, we can't reopen damages we all know, the Jurisprudence is voluminous for post trial events. The plaintiff gets Ten Thousand Dollars because everybody thinks his injury is minor and then he goes to have it operated on and it proves fatal, he dies. We can't come back and have a new day in Court.
>
> When you die, the widow comes to Court and goes out the day after she gets the award and marries a rich man who had been courting her all along; these are historic problems and the jury says, and I don't think we can reopen with respect to damages for what happens afterward

either way." (Transcript p. 408).

See also the case of Schlavick vs. Manhatten Brewing Company, 103 F. Supp. 744 (ND Ill.) (1952). The Court stated in Schlavick as follows:

> "A decedent's recovery of damages for injuries, which resulted in his death, is a bar to an action by his personal representative for wrongful death."
>
> "An action by a personal representative for the wrongful death of his decedent will be barred if such decedent in his lifetime made a valid settlement for the injuries which resulted in his death."

IV

The protective application of the doctrine of Res Judicata has been undermined by the United States Court of Appeals for the Fifth Circuit.

The Court should take note of the fact that the language in the suit brought by the widow was identical to the language in the suit brought by plaintiff before his death. Both pleadings claim that "severe financial loss" was caused by the accident and the death of decedent.

In the action filed by the widow, no request is made for damages for non pecuniary loss such as loss of love and affection, companionship and loss of consortium. The only allegation of damage is that the widow suffered "severe financial loss".

Claimant died ten days following the jury award of $175,000.00. Plaintiff did

not file for a new trial requesting that the question of damages be reopened so that damages arising out of the death of decedent could be included in the judgment. Counsel for decedent's survivors was well aware of the prohibition against such a request. On appeal of the first case, counsel for claimant did not request enlargement of the judgment due to the death of the decedent nor were any allegations made at any time that the award was inadequate or should be amended. Rather on June 24, 1970, she accepted the sum of $131,000.00 in full satisfaction of the judgment and then instituted the claim for wrongful death upon which this appeal is based.

Two conditions must be met in order for the exception of Res Judicata to apply:

1. "The judgment or decree of a Court of competent jurisdiction on the merits precludes the parties and their privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal, and

2. Any right, fact or matter in issue, and directly adjudicated on or necessarily involved in the determination of an action before a competent Court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and their privies whether or not the claim or demand, purpose or subject matter of the two suits is the same. Vol. 50 Corpus Juris Secundum, Sec. 592, P. 11. (Emphasis supplied).

We submit that the second suit by the widow meets all of the essential elements necessary to invoke the doctrine of Res Judicata.

The widow of the deceased cannot recover again for loss of future earnings which the deceased would have earned had he lived, as his recovery in the first case included the loss of earnings, past and future. Allowance of such recovery would compensate the widow twice for the identical elements of damage. The allegations of the pleadings are identical and again the widow is requesting payment for "severe financial loss". The widow is seeking the proverbial pound of flesh, which the Court has no power to grant.

Should Mr. Gaudet never have filed suit for damages resulting from the accident, we do not dispute the right of his survivor to have done so. However, those "potential rights of his survivors were extinguished when he brought the first suit and subsequently obtained a jury award. The judgment obtained by Mr. Gaudet before his death was inherited as a property right by his widow. She has no right to enlarge it.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

McCLENDON, GREENLAND & DENKMAN

By: _____

WILLIAM H. McCLENDON, JR.
3301 North Causeway Blvd.
Metairie, La. 70002
Telephone: 837-2144
Attorneys for defendant,
Sea-Land Services, Inc.

PROOF OF SERVICE

I, William H. McClendon, Jr., attorney for defendant and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing application for writs on:

GEORGE W. REESE, Attorney
627 National Bank of Commerce
New Orleans, Louisiana 70112

by mailing a copy thereof, postage prepaid addressed to their respective offices, this 19th day of January, 1973.

WILLIAM H. McCLENDON, JR.

APPENDIX "A"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY

Filed: October 29, 1971

October 28, 1971
Heebe, J.

Helen Stein Gaudet, Administratrix of the Estate of Awtrey C. Gaudet, Sr.

versus

Civil Action
No. 70-3035
Section B

Sea-Land Services, Inc.

This cause came on for hearing on a previous day on the motion of defendant, Sea-Land Services, Inc., to dismiss on grounds of res judicata and for failure to state a claim upon which relief can be granted.

The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the motion of defendant, Sea-Land Services, Inc., to dismiss on grounds of res judicata and for failure to state a claim upon which relief can be granted, be, and the same is hereby, GRANTED.

(Signed) FREDERICK J. R. HEEBE

George W. Reese, Esq.
Stuart McClendon, Esq.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3517

HELEN STEIN GAUDET, Administratrix of
THE ESTATE OF AWTREY C. GAUDET, SR.,
Plaintiff-Appellant,

versus

SEA-LAND SERVICES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

(August 3, 1972)

Before BROWN, Chief Judge, RIVES and CLARK, Circuit Judges.

CLARK, Circuit Judge: The Albatross inherent in the vagaries and vicissitudes of right and remedy under differing state wrongful death statutes has been lifted from the Mariner's neck. *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, ____ L.Ed.2d ____ (1970). Though the reckoning of the Supreme Court predicts this course will steer the Mariner into "more placid waters," *Moragne* at 408, they are waters

which remain uncharted. Today we map at least part of them.

Helen Gaudet filed a complaint against Sea-Land Services, Inc. to recover damages for the wrongful death of her husband which allegedly resulted from injuries he had received aboard a Sea-Land vessel. During his lifetime, Mr. Gaudet sought personal recovery for these same injuries. Ten days before his death he obtained a favorable judgment based upon a jury verdict for 175,000 dollars (to be reduced by 20 per cent for contributory negligence). Mrs. Gaudet was substituted for Mr. Gaudet in the action in order to respond to post-trial motions and to answer the appeal. *Helen Stein, Widow and Administratrix v. Sea-Land Services, Inc.*, ____ F.2d ____ (5th Cir. 1971) [No. 30525, March 29, 1971]. The judgment was subsequently affirmed by this court and was satisfied by payment to Mr. Gaudet's estate. Thereafter Mrs. Gaudet brought the present suit claiming financial losses due her as a result of Mr. Gaudet's death. The court below granted Sea-Land's motion to dismiss on the grounds of res judicata and failure to state a claim upon which relief could be granted. Because we hold that Mrs. Gaudet retained a compensable cause of action for Mr. Gaudet's death wholly apart from and not extinguished by the latter's recovery for his personal injuries, we reverse.

As this suit is one brought in admiralty for wrongful death upon a state's territorial waters (Louisiana), whether or not it should be barred by the decedent's prior recovery is now a question of federal maritime law. Its resolution is part of that "further sifting

through the lower courts" envisioned by the Supreme Court in *Moragne*, at 409, and is a function of our responsibility for fashioning the controlling rules of this newly-created maritime action. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963). Such a role is not novel; admiralty law has for some time been "primarily judge-made law." *The Tungus v. Skovgaard*, 358 U.S. 588, 611 (1959); *Fredelos v. Merritt-Chapman & Scott Corporation*, 447 F.2d 435, 438-40 (5th Cir. 1972); *see* Landis, *Statutes and the Sources of Law*, in Harvard Legal Essays 213, 226-27 (1934); Note, *Maritime Wrongful Death After Moragne: The Seaman's Legal Lifeboat*, 59 Geo.L.J. 1411, 1420 (1971). However, we have neither the intention nor the need to weave out of whole cloth a new suit in which to clothe this previously unrecognized cause of action; we have but to piece together the materials that are already available, *e.g.*, the general maritime law, personal-injury cases, state wrongful death statutes, and the Death on the High Seas Act, by a pattern that complements the purposes designed by the Supreme Court in *Moragne*.

Sea-Land puts forth two basic arguments to support its contention that the maritime wrongful death action ought not be available in this case. It first maintains that Mrs. Gaudet is attempting to recover twice for the same wrongful act; that this is the second identical claim for the same injuries; and that to sustain the claim would permit double recovery. But this is not true. The personal injury and wrongful death suits assert two distinct causes of action designed to compensate for two separate losses — the first for the loss and suffering of the injured while he lived, and the

second for the losses to his beneficiaries on account of his death. *Baltimore & Ohio S.W. Ry. v. Carroll*, 280 U.S. 491, 50 S.Ct. 182 (1930); *Michigan Central Ry. v. Vreeland*, 227 U.S. 59, 33 S.Ct. 192 (1913). Damage elements in the first generally include pain and suffering, medical expenses, and loss of earnings. But the second entails, though it is not always limited to, loss of support, loss of services (including society, care, and attention), loss of love and affection, grief or mental suffering of the survivors, and funeral expenses. *See generally*, Prosser, Law of Torts, pp. 927-32; Demos, *Measure of Damages — Wrongful Death*, 60 Ill. B.J. 518 (1972). Quite obviously, the jury verdict recovered by Mr. Gaudet during his lifetime did not include damages done to others by his death which had not yet occurred.[1] As the Supreme Court said in the *Carroll* case, *supra*, at 494:

> Although originating in the same wrongful act or neglect, the two claims [personal injury and wrongful death] are quite distinct, no part of either being embraced in the other. . . . One begins where the other ends, and a recovery upon both in the same action is not a double wrong. St. Louis, Iron M & S Ry. Co. v. Craft,

---

[1]Mrs. Gaudet concedes that a possibility of double recovery does exist in that Mr. Gaudet's prior compensation for loss of future wages, and her own anticipated compensation for loss of support each represents the same funds and ought not to be twice paid. We commit to the discretion of the trial court the task of making an appropriate deduction from or accommodation of any judgment to which Mrs. Gaudet might otherwise be entitled, to insure that no double recovery results. *Cf.* Billiot v. Sewart, 382 F.2d 662 (5th Cir. 1967); Prosser, *supra*, at 934-35.

237 U.S. 648, 658, 35 S.Ct. 704, 706, 59 L.Ed. 1160 (1915).

We intimate nothing as to the possibility of Mrs. Gaudet proving any of the possible damage elements listed above, nor which of them should be includible in this federal maritime action. *See* 25 Ark.L.Rev. 510 (1972). We note only that some of these elements have already been specifically recognized as compensable, *Dennis v. Central Gulf Steamship Corporation*, 453 F.2d 137 (5th Cir. 1972); *In re* Sincere Navigation Corp., 329 F. Supp. 652 (E.D. La. 1971), and were not part of Mr. Gaudet's recovery. We conclude, then, that Mrs. Gaudet's suit is not res judicata and such further wrongful death compensation as she might receive will not be part of a twice-told tale.

Sea-Land's second ground for dismissal is more trouble-some. Relying upon what all parties concede to be the "majority role," it is argued that:

> ... where the statute in effect gives a remedy to recover damages where the death of a person is caused by the negligent or wrongful act of another, *such remedy depends upon the existence in the decedent, at the time of death, of a right of action to recover damages for such injury;* hence, if by a recovery of a judgment for damages due to the injury, or by a settlement with the wrongdoer, the injured person releases his cause of action, such release, in the absence of fraud or mistake, will preclude a recovery by his personal representative of damages based upon the same negli-

> gent or wrongful act. (emphasis supplied). Annot., 39 A.L.R. 579 (1925); *accord*, 22 Am.Jur.2d *Death* § 90 (1965); 25 C.J.S. *Death* § 49; Prosser, Law of Torts 932 (3d ed. 1964).

For several reasons, we refuse to hold that this rule should operate to bar Mrs. Gaudet's wrongful death action.

First, we note that a substantial number of those cases which foreclosed relief to a decedent's beneficiaries whenever the decedent himself had already recovered for his own injuries were based on "survival-type" rather than "true" wrongful death statutes. *See, e.g., Schlavick v. Manhattan Drilling Co.*, 103 F.Supp. 744 (N.D. Ill. 1952), a case on which Sea-Land relies, and the text in 22 Am.Jur.2d *supra*. Such survival statutes merely preserve for a decedent's beneficiaries a cause he himself had at death but had never pursued. However, the wrongful death action Mrs. Gaudet now attempts to bring never belonged to Mr. Gaudet and in fact did not even accrue until his death. *Baltimore & Ohio S.W.Ry. v. Carroll, supra* at 495. Having recognized these important distinctions, the Louisiana state courts, wherein Mrs. Gaudet's action *would have been permitted*, have reasoned:

> Where, however, a cause of action does arise, and the injured person has a period of suffering and expense, there seems no reason that he should not be able, while living, to make an adjustment of his claim with defendant which would bar a recovery by his beneficiaries after his death upon the same claim.

> But the action given under other than survival statutes is entirely distinct from the action which deceased had at the moment prior to his death. It is an action for damages arising from the mere fact of death, not damages to the deceased, but damages to his successors under the statute. Therefore, we cannot comprehend the reasoning which enables an injured person to release a cause of action which has not accrued, and cannot accrue until his death, and which then accrues to third persons. It would be necessary to support such a conclusion that we admit that a person has a right of action for his own death.
> Johnson v. Sundbery, 150 So. 299, 301 (La.App. 1933). *Accord*, Gilmore v. Southern Ry., 229 F.Supp. 198, 200-01 (E.D. La. 1964).

We concur in this analysis. *Accord, Montellier v. United States*, 315 F.2d 180 (2nd Cir. 1963); *Brown v. Moore*, 247 F.2d 711 (3rd Cir. 1957), *cert. denied*, 355 U.S. 882, 78 S.Ct. 148, *Wilson v. Massengill*, 124 F.2d 666 (6th Cir. 1942), *cert. denied*, 316 U.S. 711, 62 S.Ct. 1274; *see Ruditis v. Gallop*, 269 F.2d 50 (8th Cir. 1959); *Kroger Grocery & Baking Co. v. Reddin*, 128 F.2d 787 (8th Cir. 1942); *Puget Sound Traction Light & Power Co. v. Frescoln*, 245 F. 301 (1917).

Second, even were the majority rule supported exclusively by cases interpreting "true" wrongful death statutes, i.e., those that establish a new, not a revived cause of action, we would still decline to follow it. In establishing a uniform rule for the operation of the wrongful death suit in admiralty, we have both the

authority and the responsibility to espouse a minority rule if it better serves the purposes of the action. Here it does. We have not overlooked the fact that Lord Campbell's Act,[2] the original wrongful death statute, contained an express provision limiting the death action to those cases where the deceased could have recovered damages if he had lived. Rather, we are in complete accord with Prosser's observation that:

> It is not at all clear ... that such provisions of the death acts ever were intended to prevent recovery where the deceased once had a cause of action, but it was terminated before his death. The more reasonable interpretation would seem to be that they are directed at the necessity of some original tort on the part of the defendant, under circumstances giving rise to liability in the first instance, rather than to subsequent changes in the situation affecting only the interests of the decedent. Prosser, *supra* at 933.

Thus, we are persuaded that such language means no more than that if the wrongful act of a defendant which allegedly caused death was itself an actionable tort, a wrongful death claim may be stated.

---

2 9 & 10 Vict., ch. 93: '... That whensoever the Death of a Person shall be caused by wrongful Act, Neglect or Default, and the Act, Neglect or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured.'

Nevertheless, even under the more restrictive majority interpretation of the Lord Campbell's Act language, we think Mrs. Gaudet stated a claim: Mr. Gaudet did have a cause of action immediately before death. At that moment, his right to collect damages for his personal injuries was very much alive, viable, and pending. In no sense could that right be said to have been already extinguished on the day he died. Indeed, the Death on the High Seas Act, the only federal statute designed exclusively to compensate wrongful death in admiralty, explicitly provides for the right of a beneficiary to bring a wrongful death action where the decedent's personal injury action is pending at death. 46 U.S.C.A. § 765.[3] That section takes note of but one example of the broader principle we specifically hold today: when an injured seaman dies, his widow's wrongful death action does not die with him.

Finally, and most importantly to this court, we cannot interpret *Moragne* as having created a wrongful death action in admiralty, at long last, only for the families of those decedents who failed to recover for their own injuries during life. The High Court in that case clearly recognized that the breach of a primary

---

[3] If a person die as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

duty to a mariner which causes both injury and death results in two separate harms:

> . . . in the case of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to him — usually spouse and children — seek to recover for their total loss of one on whom they depended. *Id.* at 382.

We refuse to now hold that such a "total loss" is to go uncompensated on the wholly arbitrary rationale that the injured person has already sued for or recovered for his *separate damages*.

It is unquestioned in some cases that both the decedent's damages and the beneficiaries' damages can be recovered. We have recently approved the combining of a state survival action with a Death on the High Seas action so that both recoveries may be obtained. *Dennis v. Central Gulf Steamship Corp.*, *supra* at 140; *accord, Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3rd Cir. 1971); Petition of Gulf Oil Corp., 172 F.Supp. 911 (S.D.N.Y. 1959); *see Kernan v. American Dredging Co.*, 355 U.S. 426, 431, *n.* 4. Are we now to conclude that both recoveries are available only where neither is sought before death? Is the rule to be that a man may bring suit to ameliorate his pain and suffering and lost wages, but only at the risk of sacrificing his beneficiaries' action should he die? We refuse to tell the injured mariner to "take the cash and let the promise go,"[4] for *Moragne's* broad purposes will permit

---

[4]Edward Fitzgerald, *Rubaiyat of Omar Khayam of Naishapur*, Stanza XIII.

no such ukase. Therein the Supreme Court, at 387, reiterated with approval Chief Justice Chase's remarks in The Sea Gull:

> ... and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.
> 21 Fed.Cas. 909, 910 (No. 12,578) (C.C.Md. 1865).

Nor does anything in the Supreme Court's decisions in *Mellon v. Goodyear*, 277 U.S. 335, 48 S.Ct. (1928) and *Flynn v. New York, N.H.&H.R. Co.*, 283 U.S. 53, 51 S.Ct. 357 (1931) persuade us otherwise. In those two cases, both of which were actions on behalf of a decedent's widow to recover damages for wrongful death under the Federal Employer's Liability Act, 45 U.S.C.A. §§ 51-59, the Supreme Court denied relief on the grounds that:

> By the overwhelming weight of judicial authority where a statute of the nature of Lord Campbell's Act in effect gives a right to recover damages for the benefit of dependents, the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury. Mellon v. Goodyear, *supra*, at 344.

In the *Mellon* case, the decedent had effected a compromise with his employer before death, and in the

Flynn case, the statute of limitations had run on the decedent's personal injury right before death.[8] Though we find those two cases analogous to the one before us, we do not construe them as amounting to "established and inflexible rules" that *must* now be applied in the admiralty court to bar Mrs. Gaudet's remedy. First, as previously stated, Mr. Gaudet did have a cause of action immediately before death. Though we could rest our decision on that basis alone, we choose not to do so. The policy favoring recovery for a breach of a federal maritime duty is far too important to be left teetering on such a technicality. *Moragne* at 393. We are persuaded that, at least in the admiralty law, the Supreme Court has made the cleavage between a personal injury and a wrongful death suit unmistakable in *Moragne* — the wrongful death right is completely independent from and in nowise derivative of the decedent's personal injury claim. That was not so in *Mellon* and *Flynn;* in those cases wrongful death rose and fell with personal injury. Thus if we assume that a "statute of the nature of Lord Campbell's Act" ought to be interpreted for FELA purposes today as foreclosing any remedy to a spouse whose partner recovered during his or her life, *Mellon* at 344, we must conclude it could not have been such a Lord Campbell's Act that the Supreme Court gave to admiralty in *Moragne*. It was rather an action that would reaffirm the "special solicitude" the admiralty court held for those coming within its

---

[8] In a comparable FELA case, the Ninth Circuit has recently strictly adhered to the principle announced in *Mellon*. Walrod v. Southern Pacific Co., 447 F.2d 930 (9th Cir. 1971).

jurisdiction;[6] an action that would extend a remedy save where there was a legislative direction to except a particular class of cases;[7] and an action that would in some measure compensate for the total loss of one upon whom others depended.[8] We hold that such an action is not one that can be sued out, sold out, compromised, or lost by the deceased's actions or inaction before it ever comes into being.

REVERSED and REMANDED.

---

[6] *Moragne* at 387.
[7] *Id.* at 393.
[8] *Id.* at 382.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.